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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-547

MYRON LESKIW, SIDNEY LURINSKY, DONALD WASHINGTON, FRANK OPALOCK, JOHN QUINN and ROBERT KOWTOZEWSKI,

Petitioners,

v.

LOCAL 1470, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO-CLC, ANTHONY MAKRIS, as President of Said Local 1470 and WESTERN ELECTRIC COMPANY, INC., (KEARNY WORKS),

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

Brief for Respondents Local 1470, International Brotherhood of Electrical Workers, AFL-CIO-CLC, and Anthony Makris, as President of Said Local 1470 in Opposition

Questions Presented

1. Whether the United States District Court on a complaint asserting jurisdiction under Section 301 of the

Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 185 has jurisdiction in the absence of an allegation of violation of a collective bargaining agreement?

2. Whether an allegation in a complaint asserting breach of a recognition agreement or clause, though not made in the complaint in the instant case, by means of an alleged breach of a Union's duty of fair representation is a sufficient allegation of breach of contract to satisfy the requirement for Section 301 jurisdiction?

3. Whether the allegations of the petitioners' complaint are sufficient for jurisdiction under Section 301 of the LMRA and whether said allegations are sufficient as a basis for the claims of unfair representation by the Union.

Statutory Provisions Involved

1. Section 301, Labor Management Relations Act of 1947, as amended 61 Stat. 156, 28 U.S.C. 185:

TITLE III

SUITS BY AND AGAINST LABOR ORGANIZATIONS

Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chap-

ter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Statement of the Case

Petitioners commenced the action in the United States District for the District of New Jersey alleging jurisdiction under Section 301 of the Labor Management Rela-

tions Act, as amended, (hereinafter LMRA), 61 Stat. 156, 29 U.S.C. 185.

The petitioners are six employees of Western Electric Company, Incorporated (hereinafter Western) and are members of Local 1470, International Brotherhood of Electrical Workers, AFL-CIO-CLC (hereinafter the Union) which represents a collective bargaining unit consisting of employees of Western. The petitioners commenced this action as a class action and purport to represent a class of employees called "Testers-Inspectors" who are in the said bargaining unit represented by the Union.

The gravamen of the complaint filed by the petitioners in this action, is that some of the class of employees represented by the petitioners are being underpaid as compared with other members of the class of Testers-Inspectors as a result of the effect of a contract negotiated in December, 1964 which established two groups of Testers-Inspectors:

1. "Day workers; i.e., those working on non-productive work and without incentives" and

2. "Supplementary or meantime workers to whom a supplement of $.50 is also paid."

The complaint alleges unfair discrimination by the Union and Western in the negotiation of the contract which established the two groups of Testers-Inspectors and continued in successive collective bargaining agreements between the Union and Western, namely those of 1964, 1966, 1968 and 1969. The plaintiffs' action was commenced in May, 1970.

The petitioners' complaint does not allege a violation of any of the collective bargaining agreements referred to

therein. Allegations of the complaint are couched in terms of conclusions and the complaint does not allege facts to support such conclusions. In effect the allegations of hostile and arbitrary discrimination and arbitrary, unfair, invidious and irrelevant treatment by the respondents is based upon the aforesaid establishment of two groups of Testers-Inspectors and on the resultant fact that some Testers-Inspectors were paid on an incentive basis, some were not paid on such basis, and as a consequence, some were underpaid.

Relief sought in the complaint is by way of damages for alleged wage losses, an order requiring the respondents to negotiate in good faith for wage increases and an order enjoining respondents from further alleged discrimination in the negotiation and application of labor contracts.

The respondents, Western, the Union and Anthony Makris, as President of Local 1470 (hereinafter Makris), made separate motions to dismiss the complaint in the District Court and the Court dismissed the complaint of petitioners pursuant to said motions on the ground of lack of jurisdiction over the subject matter. The petitioners appealed to the United States Court of Appeals for the Third Circuit from the judgment of the United States District Court dismissing the petitioners' complaint. Prior to the hearing before the Circuit Court of Appeals, respondents notified the Court of two decisions which were decided and reported subsequent to the submission of the original briefs to the Court of Appeals, which may have related to issues before the Court. The said cases were *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274 (1971), and *Richardson* v. *Communications Workers of America*, 443 F. 2d 974 (8th Cir. 1971). At the oral argument the Court of Appeals granted the parties leave to submit supplementary briefs directed particu-

larly to the effect of the said decisions on the decision of the Circuit Court in *Adams* v. *Budd*, 349 F. 2d 368 (3rd Cir. 1965). Supplementary briefs were submitted by appellants and respondents. The Court of Appeals affirmed the judgment of the United States District Court for the District of New Jersey.

The petitioners herein petition this Court for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. § 1254 (1). The respondents, Local 1470, I.B.E.W., AFL-CIO-CLC, and Anthony Makris as President of Local 1470, oppose the petition for a Writ of Certiorari.

ARGUMENT

I

The decision of the United States Court of Appeals for the Third Circuit in this case is not in conflict with the decisions of other Courts of Appeal and is not in conflict with the decisions of this Court on the same matter.

In order to invoke the jurisdiction of the United States District Court under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, it is essential that the complaint contain an allegation or allegations of a violation of a collective bargaining agreement. *Local Union No. 12* v. *NLRB*, 368 F. 2d 12 (5th Cir. 1966), cert. denied 389 U. S. 837 (1967), re-hearing denied 389 U. S. 1060 (1968); *Adams* v. *Budd*, 349 F. 2d 368 (3rd Cir. 1965). Where a complaint alleges unfair representation by a Union or by a Union in conspiracy or collusion with an employer or in cooperation with an employer during

the negotiation of a collective bargaining agreement and does not allege a breach of an existent agreement, such allegations do not give a Court jurisdiction under Section 301 but rather constitute charges of breach of duty of fair representation capable of being remedied by the National Labor Relations Board within its exclusive jurisdiction by reason of the preemption doctrine enunciated by this court. The United States Court of Appeals for the Eighth Circuit stated in the case of *Woody* v. *Sterling Aluminum Products*, 365 F. 2d 448 (8th Cir. 1966), cert. denied 386 U. S. 957, (1967):

> "Our remaining jurisdictional issue concerns those allegations in Count I charging the Union with conspiring and colluding with Sterling, bargaining in bad faith to plaintiffs' detriment and failing to represent plaintiffs fairly and honestly. The District Court held that the plaintiffs' charges of the Union's bad faith in negotiating the collective bargaining agreement were not predicated upon the collective bargaining agreement so as to give the Court jurisdiction under § 301, but rather looked beyond the agreement to the exclusive bargaining representatives' obligation of fair representation and was within the exclusive jurisdiction of the National Labor Relations Board. We think this holding was correct. San Diego Bldg. Trades Council v. Garmon, supra, Local No. 100 v. Borden, 373 U. S. 690, 53 LRRM 2322 (1963); Local No. 207 v. Perko, 373 U. S. 701, 53 LRRM 2327 (1963)", 365 F. 2d at 456.

In *Adams* v. *Budd Company*, 349 F. 2d 368 (3rd Cir. 1965), a case in point cited in the opinions of the courts below, the Court stated at page 370:

> "Here the plaintiffs do not seek redress for violation *of* a collective bargaining agreement; what they seek is redress for an alleged violation *by* a labor contract of rights which they assert were independently, and pre-agreement, vested in them by their contract of hire.
>
> We are of the opinion that Section 301 (a) did not confer jurisdiction upon the District Court to entertain this action and that it should have dismissed it for that reason." 349 F. 2d at 370.

The Court in the *Adams* v. *Budd Company* (supra) case arrived at its conclusion upon the Union's contention that the plaintiffs' claim:

> "'. . . is not based upon a violation of a contract between the employer and a labor organization' but 'solely upon the adverse effect upon plaintiffs of the negotiation of such agreement'." 349 F. 2d at 369.

The Court in *Woody* v. *Sterling Aluminum Products*, 365 F. 2d 448 (8th Cir. 1966), cert. denied 386 U. S. 957 (1967), a case similar in fact to the case at bar, was in accord with the decision in *Adams* v. *Budd* (supra) in its holding that allegations of a breach of an existent collective bargaining agreement must be made in the complaint in order to give a Court jurisdiction under Section 301 of the LMRA. An examination of the decisions appears to indicate no conflict among the Circuit Courts of Appeal on this proposition of law. The case of *Vaca* v. *Sipes*, 386 U. S. 171 (1967) did not overrule, change or modify the decisions in the case of *Adams* v. *Budd Company*, 349 F. 2d 368 and the case of *Woody* v. *Sterling Aluminum Products* (supra). The *Vaca* case is on its facts a case involving a direct breach of contract. The case includes

the elements of an allegation of unfair representation combined with an allegation of breach of contract resulting from the alleged unlawful discharge of an employee.

There is little doubt that the duty of fair representation by a Union commences from the moment of certification by the National Labor Relations Board or proof of requisite representation resulting in recognition through the negotiating process to a collective bargaining agreement and thereafter. An allegation of unfair representation at any time is not sufficient in and of itself and alone to invoke jurisdiction under Section 301 of the Labor Management Relations Act unless there is alleged the breach of an existent collective bargaining agreement. An allegation of employer involvement in an unfair representation by a Union without the employer involvement constituting a breach of contract, does not give rise to the Section 301 jurisdiction. *Woody* v. *Sterling Aluminum Products*, 365 F. 2d 448 (8th Cir. 1966), cert. denied 386 U. S. 957 (1967). Unfair representation charges without a related breach of contract gives rise to an unfair labor practice and in such case jurisdiction of the unfair representation case is within the exclusive jurisdiction of the National Labor Relations Board under the preemption doctrine first enunciated in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, (1959). The preemption doctrine was more recently restated in *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274 (1971).

Where the duties and obligations inherent in the recognition clause of a collective bargaining agreement are breached, such breach is not, as suggested, a violation of a duty imposed by the collective bargaining agreement but is rather a violation of a duty imposed by law commencing and based, as in this case, upon the certification of a

union as the exclusive representative of a bargaining unit by the National Labor Relations Board which has the authority to enforce such duty and obligations. A recognition clause is not truly a creation of agreement but rather the memorial of a relationship created by law. Certification or recognition creates the statutory agency relationship which gives the authority for a union to engage in bargaining on behalf of the employees it represents.

The obligation of a union to the members of the bargaining unit it represents, even if contractual, is one that is implied in law and is not an agreement, the breach of which is cognizable under Section 301 of the LMRA. Both the United States Circuit Court of Appeals for the Eighth Circuit and this Court have clearly enunciated this principle. In *Richardson* v. *Communications Workers,* 443 F. 2d 974, (8th Cir. 1971) the Court stated:

> "The plaintiff pleaded and tried his case on the theory that the Union breached the collective bargaining agreement as to the non-discrimination clause. Assertion of the claim against the Union for breach of contract misconstrues the relationship between the parties to a collective bargaining agreement. The Union is signatory to the agreement on behalf of all the employees. It thus serves in the capacity of a fiduciary to the employees. See, generally, Cox, supra, 57 Mich. L Review at 21. In fact, the rights of the individual employees are the 'major focus' of the bargaining contract with the company. *Smith* v. *Evening News Ass'n.,* supra, at 200. Breach of the agreement by the bargaining agent, which simultaneously conflicts with its role as a fiduciary to the employee, creates a claim for breach of trust of its statutory duty to

> give adequate representation and not for one arising out of the collective bargaining contract." 443 F. 2d at 980.

In *Motor Coach Employees* v. *Lockridge,* 403 U. S. 274 (1971) this Court clearly distinguished the obligation arising from the duty of fair representation from an obligation arising out of a collective bargaining agreement when it stated:

> "The legislative determination that courts are fully competent to resolve labor relations disputes through focusing on the terms of a collective bargaining agreement cannot be said to sweep within it the same conclusion with regard to the terms of union-employee contracts that are said to be implied in law. That is why the principle of Smith v. Evening News is applicable only to those disputes that are governed by the terms of the collective bargaining agreement itself." 403 U. S. at 300.

Thus, the alleged breach of a recognition agreement, in any form, cannot support a claim of violation of a collective bargaining agreement so as to place such breach within the ambit of Section 301 of the LMRA.

In the cases of *Steele* v. *Louisville & Nashville Railroad Co.,* 323 U. S. 192 (1944) and *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen, Ocean Lodge No. 76,* 323 U. S. 210 (1944), unfair representation was charged against the union in each case and in both cases consisted of allegations of discrimination as to the race of the employees. The Court found that such discrimination was irrelevant, hostile and invidious. The Court further found that the statutory representative was not barred from negotiating contracts which resulted in unfavorable effects

on some members of the bargaining unit. As to the question of jurisdiction, in both cases the Court analyzed the division of jurisdiction under the Railway Labor Act and concluded that there existed no administrative remedy under the Act for employees charging a union with unfair representation since the Railway Adjustment Board was authorized to deal only with contract violations; i.e., disputes between an employee or groups of employees and the employer arising from grievances or in connection with the interpretation or application of collective bargaining agreements, 48 Stat. 1189, 45 U.S.C. § 153, First (i). Under the LMRA, however, charges of contract violations must be brought in accordance with Section 301 of the LMRA in the United States District Court while all other violations of the LMRA are within the exclusive jurisdiction of the National Labor Relations Board.

At no point in its opinions in the *Steele* (supra) case or the *Tunstall* (supra) case, did the court imply that breach of the duty of a representative, implied in that word, could be considered as converted into a breach of the collective bargaining agreement because the word "representative" is contained in a recognition clause or other clause of the collective bargaining agreement. The petitioners' implication that such a consideration or conversion should be made is not tenable in light of the text of the decisions in *Richardson* v. *Communications Workers,* 443 F. 2d 974 at 980, and *Motor Coach Employees* v. *Lockridge,* 403 U. S. 274 at 300, and the quotations therefrom relative to the distinction between the duty of fair representation and duties arising out of collective bargaining agreements heretofore set forth on pages 10 and 11, respectively.

In *Czosek* v. *O'Mara,* 397 U. S. 25 (1970), another Railway Labor Act case, and jurisdictionally distinguishable

as such, involving alleged unfair representation and wrongful discharge, the Court discussed the issue of allowing the employer to be brought into the unfair representation case and decided that to insure complete and meaningful relief the Courts may properly exercise jurisdiction over both the Union and the employer. The LMRA counterpart to this jurisdiction of the two causes is the common situation in Section 301 cases where the Union is joined on an allegation of unfair representation with the allegation of breach of contract against the employer in a direct action under Section 301 for employer breach of contract.

In conclusion, the petitioners' theory that alleged breach of a preliminary recognition agreement satisfies the requisite of an allegation of violation of contract to invoke federal court jurisdiction under Section 301 is in conflict with the decisions of this Court and with that of the Circuit Court of Appeals. *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274 (1971); *Richardson* v. *Communications Workers*, 443 F. 2d 974 (8th Cir. 1971). The contention that an employer's collaboration with or cooperation in the union's alleged unfair representation has been dealt with by the Court of Appeals for the Eighth Circuit and the Eighth Circuit is in accord with the decision of the Third Circuit below, *Woody* v. *Sterling Aluminum Products*, 365 F. 2d 448 (8th Cir. 1966), cert. denied 386 U. S. 957 (1967). The implication sought to be made in the examination of the Railway Labor Act as set out in the petitioners' brief (pages 9 and 10), and its comparative examination of the LMRA with respect to the duties inherent in representation is without merit since although a duty of fair representation is implied under both the Railway Labor Act and LMRA, the violation of a duty of fair representation cannot be converted to a violation of the collective bargaining agreement merely because the

word representative may be contained in a recognition clause or other clause of the collective bargaining agreement. *Motor Coach Employees* v. *Lockridge* (supra) and *Richardson* v. *Communications Workers* (supra). The comparison of the Acts generally and cases under the Railway Labor Act and the LMRA as to jurisdiction is without meaning in the instant case since the jurisdiction under the Railway Labor Act over violations of contract causes of action and unfair representation causes are directly opposite to the jurisdiction over the same causes under the LMRA. Consequently, it is clear that there is no conflict between the decision of the Third Circuit in this case and the decision of other Circuit Courts of Appeal or of this Court.

II

There is no substantial federal question of law raised in the complaint by the petitioners which has not heretofore been determined by this Court nor does the complaint of the petitioners state a substantial federal claim upon which relief can be granted.

In order to sustain a cause of action asserting Section 301 jurisdiction and alleging a breach of the duty of fair representation, it is necessary that the complaint allege (1) a breach of the collective bargaining agreement and (2) a breach of the duty of fair representation.

The petitioners admit that no express allegation was made in their complaint of breach of any of the provisions of the various collective bargaining agreements referred to in the complaint.

With respect to unfair representation, allegations of facts must be made from which a court might reasonably

infer that a union's actions involved those elements necessary to a charge of unfair representation. In *Humphrey* v. *Moore,* 375 U. S. 335, 348 (1964), this Court noted the element of "substantial evidence of fraud, deceitful action or dishonest conduct on the part of the union". Later in *Vaca* v. *Sipes,* 386 U. S. 171, 193 (1967), this Court added the element of "arbitrary or bad faith conduct on the part of the Union". Most recently in *Motor Coach Employees* v. *Lockridge,* 403 U. S. 274, 301 (1971), this Court considered as requisite elements to a charge of unfair representation that there need be adduced "substantial evidence of discrimination: that is intentional, severe and unrelated to legitimate union objectives".

The petitioners here alleged in their complaint various legal conclusions to the effect that one or more of the respondents have treated the petitioners and the class they purport to represent with arbitrary disregard, unfair discrimination, virtual hostility, neglect in bad faith and nonfeasance, hostile discrimination, arbitrary and capricious acts and in an arbitrary, unfair, invidious and irrelevant manner.

These legal conclusions are based fundamentally upon a single allegation of fact from which other and additional factual conclusions are derived. The single allegation of fact is that in December, 1964, the union entered into a collective bargaining agreement with Western which contained a provision dividing Testers-Inspectors into two groups, day workers and incentive workers, who perform "similar or allied work" (paragraph 17 of the complaint at Petition A. 4) or "identical or practically identical work" (paragraph 20 of the complaint at Petition A. 4) and that that contract and subsequent contracts were enforced by the parties. The conclusion derived from this fact allegation is that one part of the two groups of

Testers-Inspectors was "underpaid" (paragraph 20 of the complaint at Petition A. 4) in comparison with the other group. The single alleged fact and the conclusionary allegations derived from that fact are not sufficient as supportive of the inference of hostile, invidious, arbitrary, unfair and irrelevant discrimination. There are no other allegations of facts in the complaint of the petitioners from which a Court might reasonably draw an inference of hostile, invidious, arbitrary, unfair and irrelevant discrimination.

In the *Steele*, 323 U. S. 192 (1944), *Tunstall*, 323 U. S. 210 (1944) and *Czosek*, 397 U. S. 25 (1970) cases, allegations of facts supporting the respective charges of unfair representation were made. In the case at bar, no such factual allegations were made to support the charge of unfair representation.

The allegation of fact in the instant case does not support the legal conclusions alleged by the petitioners and if jurisdiction under Section 301 were to be founded upon this bare fact allegation then any contract involving differences among employees would be subject to review by a federal court. The effect of such enlargement of the jurisdiction of the courts is clearly evident and was recognized by U. S. District Court Judge Coolahan in his decision below:

> "Finally and perhaps most importantly one must inquire as to the potential consequences should suits like this be allowed to be maintained. Surely the salutary objectives of §301 would not be fostered. Every dissident faction of union members would be able to bring suit in district court by simply alleging unfair representation should they find themselves dissatisfied with the bargain struck by their lawfully elected representatives." (A. 15)

In *Ford Motor Co.* v. *Huffman*, 345 U. S. 330, 338 (1953) the Court stated:

> "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected."

Most recently, in *Woody* v. *Sterling Aluminum Products*, 365 F. 2d 448 (8th Cir. 1966), cert. denied 386 U. S. 957 (1967), as indicated heretofore a case similar to the one at bar, the Court of Appeals for the Eighth Circuit stated:

> "No precedent has been called to our attention and our research has revealed none that would vest the federal courts with jurisdiction under such circumstances as exist here. Indeed, to rule jurisdiction might well jeopardize the whole concept of collective bargaining as we know it." 365 F. 2d at 457.

The complaint of the petitioners is not one which presents a substantial federal question of law nor one which states a claim upon which relief can be granted by a federal court.

CONCLUSION

For the aforesaid reasons, it is respectfully submitted that the Petition for A Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit in this case should be denied.

November 3, 1972.

Respectfully submitted,

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